No. 9463

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALBERT K. MILLER,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

REPLY BRIEF FOR PETITIONER.

F. DAVID MANNOCCIR, II,
405 Montgomery Street, San Francisco, California,
Attorney for Petitioner.

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Subject Index

Point 1. Page

Respondent claims Section 117 was not in effect in 1933.... 1

Point 2.

Section 218(a) of Title II of the National Industrial Recovery Act is unconstitutional..... 2

Point 3.

The statutory provision here involved is unconstitutional because of retroactive effect given it..... 15

Table of Authorities Cited

Cases

	Pages
Allied Agencies, Inc. v. United States, 26 Fed. Sup. 98	13
Arkansas Gas Co. v. Railroad Commission, 261 U. S. 379	20
Blodgett v. Holden, 275 U. S. 142	21
Brown & Sons Co. v. Burnet, 282 U. S. 283	17
Brushaber v. Union Pacific R. R. Co., 240 U. S. 1	15, 23
Burnet v. Wells, 289 U. S. 670	18
Carter v. Carter Coal Co., 298 U. S. 238	7, 9, 11
Cereal Products Refining Corp. v. Commissioner, 39 B. T. A. 92	13
Champlin Rfg. Co. v. Commissioner, 286 U. S. 210	5
Cooper v. United States, 280 U. S. 409	16
Crowhurst, A. J., & Sons, Inc., 38 B. T. A. 1072	13
Electric Bond & Share Co., et al. v. Securities and Exchange Commission, et al., 303 U. S. 419	6
Fawcus Mach. Co. v. United States, 282 U. S. 375	16
Graham & Foster v. Goodcell, 282 U. S. 409	17
Lewellyn v. Frick, 268 U. S. 238	20
Lynch v. Hornby, 247 U. S. 339	16
Phillips v. Commissioner, 283 U. S. 589	17
Railroad Retirement Board v. Alton Railroad Co., 295 U. S. 350	14
Reinecke v. Smith, 289 U. S. 172	18
St. Louis S. W. Ry. v. Arkansas, 235 U. S. 350	20
Schechter Poultry Corp. v. United States, 295 U. S. 495	2, 10
Shwab v. Doyle, 258 U. S. 529	20
Sonzinsky v. United States, 300 U. S. 506	6
Taft v. Bowers, 278 U. S. 470	16
United States v. Butler, 297 U. S. 1	6
United States v. Delaware & Hudson Co., 213 U. S. 366	20

Pages
United States v. Hudson, 299 U. S. 498 16
United States v. La Franca, 282 U. S. 568 20
United States v. Magnolia Company, 276 U. S. 160 21

Williams v. Standard Oil Company of California, 278 U. S. 235 ..... 3, 12
W. & K. Holding Corp., 38 B. T. A. 830 13

Codes and Statutes

Bituminous Coal Conservation Act of 1935 9

National Industrial Recovery Act:
Section 218(a) 1, 2, 10, 12, 15, 19, 21, 22
Sections 215(d) and (f) 13
Section 303 2
Title I 2, 10, 11, 12
Title II 10, 12

Revenue Act of 1918 20
Revenue Act of 1924 18
Revenue Act of 1932, Section 117 ..... 1, 2, 23

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POINT 1.

RESPONDENT CLAIMS SECTION 117 WAS NOT IN EFFECT IN 1933.

Respondent bases its first argument on the grounds that Section 117 of the Revenue Act of 1932 was not in effect during the year 1933. (Br. p. 5.) There was no statutory authority for the deduction in question. It is the contention of the Petitioner that Section 117 of the Revenue Act of 1932 was in effect in 1933 for the reasons that (1) Section 218(a) of the National Industrial Recovery Act, which endeavored to repeal Section 117 of the Revenue Act of 1932, was unconstitutional; (2) assuming Section 218(a) of the National Industrial Recovery Act was constitutional, which the Petitioner does not admit, still it

does not affect losses which were sustained in 1932 and carried over into 1933, and it does not affect income tax returns filed for the calendar year 1933.

Respondent clearly admits in its brief that if Section 117 of the Revenue Act of 1932 had been in effect during the year 1933 Petitioner would have been entitled to deduct a net loss for 1932 determined as provided in that Section. (Br. p. 5.) Therefore, the question raised is what effect, if any, did the National Industrial Recovery Act and/or Section 218(a) of said Act have on Section 117 of the Revenue Act of 1932. The answer to such questions was answered in the Petitioner's Opening Brief and will be further answered hereafter in this brief.

POINT 2.

SECTION 218(a) OF TITLE II OF THE NATIONAL INDUSTRIAL RECOVERY ACT IS UNCONSTITUTIONAL.

The Respondent answers the Petitioner's contention that Section 218(a) of the National Industrial Recovery Act is unconstitutional by stating that the case of *Schechter Poultry Corp. v. United States,* 295 U. S. 495, which held Title I of the National Industrial Recovery Act unconstitutional does not have any bearing on Section 218(a) of said Act. Respondent bases its contention on the fact that the usual separability clause, Section 303, is included in the Act. This clause raises the presumption that the legislature did not intend the Act in question to be an integrated whole, which as such must be sustained or held invalid

and cites certain cases in support of its position. (Resp. Br. p. 6.) The Petitioner admits that the inclusion of such a section in the Act does raise such a presumption but the general rule is that the unobjectionable part of a statute cannot be held separable unless it appears that standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the Act and held bad should fall. The question is one of interpretation and of legislative intent, and the legislative declaration provides a rule of construction which may some time aid in determining that intent. The inclusion of a separability clause in an Act acts *merely* as an *aid* and *not* an *inexorable command.* The effect of the presence of such a clause in an Act is discussed in the cases which are cited by the Respondent in support of its position, but when one examines these cases it is clearly apparent that each case is directly in accord with the position taken by the Petitioner, to wit:

In *Williams v. Standard Oil Company of California,* 278 U. S. 235, the Supreme Court invalidated a Tennessee statute which attempted to fix prices at which gasoline might be sold within the state. It was the contention of the Tennessee authorities that even if the price fixing provisions were invalid the other provisions of the Act, among which was a tax to defray expenses, were separable and should be sustained. The Court denied this contention and in the following statement held that the subsidiary taxing provisions of the statute must fall with the price fixing provisions, at page 241:

"Finally, it is said that even if the price-fixing provisions be held invalid other provisions of the act should be upheld as separate and distinct. This contention is emphasized by a reference to Sec. 12 of the act, which declares 'that if any section or provision of this act shall be held to be invalid this shall not effect the validity of other sections or provisions.'

"In Hill v. Wallace, 259 U. S. 44, 71, 66 L. ed. 822, 831, 42 Sup. Ct. Rep. 453, it is said that such a legislative declaration serves to assure the courts that separate sections or provisions of a partly invalid act may be properly sustained without hesitation or doubt as to whether they would have been adopted, even if the legislature had been advised of the invalidity of part. But the general rule is that the unobjectionable part of a statute cannot be held separable unless it appears that, standing alone, legal effect can be given to it and that the legislature intended the provision to stand, in case others included in the act and held bad should fall. The question is one of interpretation and of legislative intent, and the legislative declaration provides a rule of construction which may sometimes aid in determining that intent. But it is an aid merely; not an inexorable command. Dorchy v. Kansas, 264 U. S. 286, 290, 68 L. ed. 686, 689, 44 Sup. Ct. Rep. 323.

"In the absence of such a legislative declaration, the presumption is that the legislature intends an act to be effective as an entirety. This is well stated in Riccio v. Hoboken, 69 N. J. L. 649, 662, 63 L. R. A. 485, 55 Atl. 1109, where the New Jersey court of errors and appeals, in an opinion delivered by Judge Pitney (afterward a

Justice of this court), after setting forth the rule as above, said:

'In seeking the legislative intent, the presumption is against any mutilation of a statute, and the courts will resort to elimination only where an unconstitutional provision is interjected into a statute otherwise valid, and is so independent and separable that its removal will leave the constitutional features and purposes of the act substantially unaffected by the process'."

In answer to the argument that a separability clause will save the remaining portions of an invalidated act, the court reasserted the accepted rule in the following words:

"The effect of the statutory declaration is to create in the place of the presumption just stated the opposite one of separability. That is to say, we begin, in the light of the declaration, with the presumption that the legislature intended the act to be divisible; and this presumption must be overcome by considerations which make evident the inseparability of its provisions or the clear probability that the invalid part being eliminated the legislature would not have been satisfied with what remains."

In *Champlin Rfg. Co. v. Commissioner,* 286 U. S. 210, the court says, at page 235:

"This discloses an intent to make the Act divisible and creates a presumption that, eliminating invalid parts, the legislature would have been satisfied with what remained and that the scheme of regulation derivable from the other provisions

would have been enacted without regard to Section 2."

Sonzinsky v. United States, 300 U. S. 506. In this case each tax was on a different activity and is collectable independently of the other and, therefore, full effect could be given to the license tax standing alone. This case is entirely distinguishable from the case at hand.

Electric Bond & Share Co., et al. v. Securities and Exchange Commission, et al., 303 U. S. 419. This case is clearly distinguishable from the case at hand, because the Court stated:

> "In this branch of the case, petitioners address their argument to the intent of Congress, rather than to its power. But Congress has defined its intent as to separability. * * *
>
> "It is evident that the provisions of sections 4(a) and 5 are not so interwoven with the other provisions of the act that there is any inherent or practical difficulty in the separation and independent enforcement of the former while reserving all questions as to the validity of the latter. The administrative construction of the statute was formulated in that view."

Further in support of his contention the Petitioner respectfully wishes to call the Court's attention to the following cases, to wit:

In *United States v. Butler,* 297 U. S. 1, the Supreme Court, in invalidating the Agriculture Adjustment Act, denied the Government's contention that the processing taxes imposed by the Act were separable

and held that the taxing provisions could not stand alone and were invalid as well as the other provisions of the Act.

In *Carter v. Carter Coal Co.,* 298 U. S. 238, which was also cited by Respondent (Resp. Br. p. 10), at pages 311-316 (inclusive):

> "In the absence of such a provision, the presumption is that the legislature intends an act to be effective as an entirety—that is to say, the rule is against the mutilation of a statute; and if any provision be unconstitutional, the presumption is that the remaining provisions fall with it. The effect of the statute is to reverse this presumption in favor of inseparability, and create the opposite one of separability. Under the non-statutory rule, the burden is upon the supporter of the legislation to show the separability of the provisions involved. Under the statutory rule, the burden is shifted to the assailant to show their inseparability. *But under either rule, the determination, in the end, is reached by applying the same test—namely, what was the intent of the lawmakers?*
>
> "Under the statutory rule, *the presumption must be overcome by considerations which establish 'the clear probability that the invalid part being eliminated the legislature would not have been satisfied with what remains',* Williams v. Standard Oil Co., 278 U. S. 235, 241 et seq., 73 L. ed 287, 309, 49 S. Ct. 115, 69 A. L. R. 596; or as stated in Utah Power & L. Co. v. Pfost, 286 U. S. 165, 184, 185, 76 L. ed. 1038, 1048, 1049, 52 S. Ct. 548, * * *
>
> "'* * * 'the clear probability that the legislature would not have been satisfied with the statute un-

less it had included the invalid part.' Whether the provisions of a statute are so interwoven that one being held invalid the others must fall, presents a question of statutory construction and of legislative intent, to the determination of which the statutory provision becomes an aid. 'But it is an aid merely; not an inexorable command.' Dorchy v. Kansas, 264 U. S. 286, 290, 68 L. ed. 686, 689, 44 S. Ct. 323 * * * *The presumption in favor of separability does not authorize the court to 'give the statute 'an effect 'altogether different from that sought by the measure viewed as a whole.'* Railroad Retirement Bd. v. Alton R. Co., 395 U. S. 330, 362, 79 L. ed. 1468, 1482, 55 S. Ct. 758. * * *

"* * * The statutory aid to construction in no way 'alters the rule that in order to hold one part of a statute unconstitutional and uphold another part as separable, they must not be mutually dependent upon one another. Perhaps a fair approach to a solution of the problem is to suppose that while the bill was pending in Congress a motion to strike out the labor provisions had prevailed, and to inquire whether, in that event, the statutes should be so construed as to justify the conclusion that Congress, notwithstanding, probably would not have passed the price-fixing provisions of the code. * * *

"* * * Thus wages, hours of labor, and working conditions are to be so adjusted as to effectuate the purposes of the act; and prices are to be so regulated as to *stabilize* wages, working conditions, and hours of labor which have been or are to be fixed under the labor provisions. The two are so woven together as to render the probability plain

enough that uniform prices, in the opinion of Congress, could not be fairly fixed or effectively regulated, without also regulating these elements of labor which enter so largely into the cost of production. * * *

"* * * The conclusion is unavoidable that the price-fixing provisions of the code are so related to and dependent upon the labor provisions as conditions, considerations or compensations, as to make it clearly probable that the latter being held bad, the former would not have been passed. The fall of the latter, therefore, carries down with it the former. * * *" (Italics ours.)

The lower Court in the *Carter* case held that the price-fixing provisions of the Bituminous Coal Conservation Act of 1935 were valid and that the labor provisions were invalid; that the labor provisions were separable; and, since the provisions in respect to price-fixing and unfair competition were valid, the taxing provisions could stand. The Supreme Court, however, reversed the lower Court, invalidated the entire Act and held that (at page 315):

"* * * these two sets of requirements (labor regulations and price-fixing) are not like a set of bricks, some of which may be taken away without disturbing the others, but rather are like the interwoven threads constituting the warp and woof of a fabric, one set of which cannot be removed without fatal consequences to the whole." (Parentheses ours.)

The Coal Conservation Act, like the National Industrial Recovery Act, contained a separability provision

but this constituted no deterrent to the Court's invalidation of the entire Act. The effect of the provision was discussed by the Court in its decision at page 312.

The opinion above quoted sets forth certain criteria for determining the status of subsidiary or collateral provisions of an invalidated act of Congress:

(1) "What was the intent of the lawmakers?"

(2) "* * * the presumption must be overcome by considerations which establish the clear probability that the invalid part being eliminated the legislature would not have been satisfied with what remains * * *;" and

(3) "The presumption in favor of separability does not authorize the Court to give the statute an effect altogether different from that sought by the measure viewed as a whole."

In answer to the next point raised by the Respondent, in its brief (Br. p. 7), the Petitioner takes the position that Section 218(a) of Title II is so interwoven with Title I, held invalid in the *Schechter Poultry Corp.* case, that a presumption of separability is overcome and that it clearly appears that the legislature intended the act to be effective in its entirety. The soundness of the above proposition is indicated by Mr. Justice Cardozo's graphic statement in his concurring opinion in *Schechter Poultry Corp. v. United States,* supra. After emphasizing inseparability of the plan of the National Industrial Recovery Act, he stated, at page 555:

> "There is no opportunity in such circumstances for the severance of the infected parts in the hope of saving the remainder."

The *inseparability* of the provisions of the Act is also indicated by Chief Justice Hughes' statement in the majority opinion, where, in the following words, he pointed out that it was the obvious intent of the Congress that all of the divergent provisions of the Act be directed "towards a single goal". Page 536:

> "All of the policies there set forth point towards a single goal—the rehabilitation of industry and the industrial recovery which unquestionably was the major policy of Congress in adopting the National Industrial Recovery Act."

In view of this interpretation of Title I of the Act, it follows that all the provisions of the Act, including the taxing provisions, were directed "towards a single goal" and that an emaciated National Industrial Recovery Act, containing only the taxing provisions, would not have been enacted, had the legislators been aware that the major aims and provisions of the Act were unconstitutional and would be invalidated.

Therefore, applying the test set forth in *Carter v. Carter Coal Co.,* supra, it requires no extended discussion or analysis of the National Industrial Recovery Act to establish:

(1) that the single intent of the lawmakers, as Chief Justice Hughes pointed out, was "the rehabilitation of industry as stated in Title I of the Act";

(2) that in view of the singleness of that purpose and the need for drastic and far-reaching legislation,

the legislators "would not have been satisfied" to attempt to combat the evils of the depression with such futile weapons as a few minor tax revisions; and,

(3) that although the Act's concluding paragraph contains a separability clause, the presumption in favor of separability which this raises "does not authorize the Court to give the statute an effect" (minor changes in the federal tax structure) "altogether different from that sought by the measure viewed as a whole". (Rehabilitation of industry on a nationwide scale.)

The above argument is fully supported by the following statement by the Court in *Williams v. Standard Oil Company of California,* supra, at page 245:

> *"Accordingly we must hold that the object of the statute under review was to accomplish the single general purpose which we have stated,* and that purpose failing for want of constitutional power to effect it, *the remaining portions of the act, serving merely to facilitate or contribute to the consummation of the purpose, must likewise fall."* (Italics ours.)

The Respondent takes the position that the sections of Title II of the Act, including Section 218(a), have no relation to the regulatory features of Title I but are included in the Act for the obvious purpose of raising additional revenue for relief and public work expenditures and to meet the vast expenditures required and authorized by the Act. Respondent also states that in each instance where it has been suggested that these sections were invalid, the suggestion

has been repudiated and rejected and cites certain cases in support of its position. However, each of the cases so cited have been considered in the Petitioner's Opening Brief (Op. Br. pp. 11-13), and we shall refer to them here only briefly to show that such cases do not support the Respondent's contention.

In *Allied Agencies, Inc. v. United States,* 26 Fed. Sup. 98, the question of the constitutionality of the National Industrial Recovery Act was not definitely raised.

In the case of *W. & K. Holding Corp.,* 38 B. T. A. 830, the taxpayer is endeavoring to undo something he has done to himself, the result of which is causing him a direct injury and harm. However, such injury did not result from any enforcement of the provisions of the Act but from the action of the taxpayer himself.

In *A. J. Crowhurst & Sons, Inc.,* 38 B. T. A. 1072, which involved Sections 215 (d) and (f) of the Act, the Board held that under this section the taxpayer was given the opportunity to file the original declared value return and was, therefore, not deprived of his property and it thus followed that the section was not unconstitutional.

In *Cereal Products Refining Corp. v. Commissioner,* 39 B. T. A. 92, the question of constitutionality or separability was not raised. The question here is whether a corporation has a right to election with respect to making a separate or consolidated return. Said election being given by the provisions of the National Industrial Recovery Act. This case stated:

> "* * * the reason for amending the Revenue Act of 1932 in the Recovery Act was to provide additional taxes sufficient to pay interest and sinking fund charges on an appropriation made by Congress in the National Industrial Recovery Act."

It is well settled that the Supreme Court will not, by a process of judicial rewriting, transform a statute intended solely to effect nationwide economic and social reforms into a revision of revenue measures. As in the case *Railroad Retirement Board v. Alton Railroad Co.*, 295 U. S. 350, in which the Railroad Retirement Act was declared unconstitutional (page 362):

> "The statute contains a section broadly declaring the intent that invalid provisions shall not operate to destroy the law as a whole. *Such a declaration provides a rule which may aid in determining the legislative intent, but is not an inexorable command.* Dorchy v. Kansas, 264 U. S. 286, 68 L. ed. 686, 44 S. Ct. 323. It has the effect of reversing the presumption which would otherwise be indulged of an intent that unless the act operates as an entirety it shall be wholly ineffective. Williams v. Standard Oil Co., 278 U. S. 235, 242, 73 L. ed. 287, 309, 49 S. Ct. 115, 60 A. L. R. 596; Utah Power & Light Co. v. Pfost, 286 U. S. 165, 184, 76 L. ed. 1048, 52 S. Ct. 548. *But notwithstanding the presumption in favor of divisibility which arises from the legislative declaration, we cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole* * * *" (Italics ours.)

The Petitioner submits that Congress "would not have been satisfied" with the remnants of the National Industrial Recovery Act because it was obviously not an adequate measure to effect the legislators' single and ambitious purpose "to rehabilitate the nation's industry", and that for this reason the "remains" of the Act, including Section 218(a), fell with the other provisions of the Act invalidated and are now of no force and effect.

POINT 3.

THE STATUTORY PROVISION HERE INVOLVED IS UNCONSTITUTIONAL BECAUSE OF RETROACTIVE EFFECT GIVEN IT.

The Respondent takes the position that the mere fact that Section 218(a) is retroactive, it still does not violate the 5th Amendment because the Respondent states that in certain cases the constitutionality of Revenue Acts have been upheld even though they were retroactive for a very limited period of time. The Petitioner admits, as he did in his Opening Brief, that certain cases have held that to be true, but in all cases in which such has been the fact, the statutes have only been retroactive for a short period of time and have affected only transactions which have taken place during the year in which the statute was enacted. (Op. Br. p. 15.) When one examines the cases cited by the Respondent, we find that in *Brushaber v. Union Pacific R. R. Co.,* 240 U. S. 1, the statute which provided for a general yearly income tax was retroactive for a very limited and short period of time.

In *United States v. Hudson,* 299 U. S. 498, it clearly appears that the question of retroactivity is one of degree and one which is substantiated when it affects transactions which have taken place during the year in which the act was enacted. In support of this statement the Petitioner respectfully calls the Court's attention to that part of the case that was set forth in the Respondent's brief (Resp. Br. p. 11), as follows:

> "As respects income tax statutes it long has been the practice of Congress to make them retroactive for *relatively short periods so as to include profits from transactions consummated while the statute was in process of enactment, or within so much of the calendar year as preceded the enactment;* * * *" (Italics ours.)

In *Lynch v. Hornby,* 247 U. S. 339, the statute was only retroactive for a few days.

Cooper v. United States, 280 U. S. 409. This case gave no consideration to the question of a statute being retroactive in the same manner as in the case at hand.

In *Taft v. Bowers,* 278 U. S. 470, the taxpayer accepted the gift with full knowledge of the statute and as to the property received, voluntarily assumed the position of her donor.

In *Fawcus Mach. Co. v. United States,* 282 U. S. 375, the act in question gave the taxpayer ample time to readjust its accounts so that the tax would not work a hardship upon it.

In *Brown & Sons Co. v. Burnet,* 282 U. S. 283, the question of retroactivity is only referred to slightly and is not the determining factor in this case.

In *Graham & Foster v. Goodcell,* 282 U. S. 409:

> "But while the legislature could not in such a case retroactively create a liability, the Court recognized that there is a class of cases in which defects in the administration of the law may be cured by subsequent legislation without encroaching upon constitutional right, although existing causes of action may thus be defeated.
>
> It is apparent, as the result of the decisions, that a distinction is made between a bare attempt of the legislature retroactively to create liabilities for transactions which, fully consummated in the past, are deemed to leave no ground for legislative intervention, and the case of a curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice. Where the asserted vested right, not being linked to any substantial equity, arises from the mistake of officers purporting to administer the law in the name of the Government, the legislature is not prevented from curing the defect in administration simply because the effect may be to destroy causes of action which would otherwise exist. 'The power is necessary that government may not be defeated by omissions or inaccuracies in the exercise of functions necessary to its administration'."

In *Phillips v. Commissioner,* 283 U. S. 589, the power of Congress to provide an additional remedy for the enforcement of existing liability is clear.

In *Reinecke v. Smith,* 289 U. S. 172, the subject of the tax is not the creation of the trusts or the transfer of the corpus from the grantor to the grantees, but the income of the trusts which accrued after January 1, 1924, the effective date of the Revenue Act of 1924. Although the Act was passed June 2, 1924, the imposition of the tax on income received or accrued from the *beginning of the year* has been held unobjectionable.

In *Burnet v. Wells,* 289 U. S. 670, discussing in general terms the boundaries of legislative power and the limitations placed on the methods of taxation, stating that even administrative convenience, the practical necessities of an effective system of taxation, will have heed and recognition within reasonable limits.

The Petitioner wishes to respectfully call the Court's attention to the fact that the Respondent, in its brief, has failed to *recognize* or *refute* the distinction between transactions which have taken place during the year in which the Act was enacted and transactions which have taken place, as in our case, prior to the year in which the statute was enacted; therefore, it clearly appears from not only the cases cited by the Petitioner in this brief and in his Opening Brief but also from the cases referred to by the Respondent that although taxing statutes may be retroactive in effect, still they may not be supported by the Courts and held constitutional if their retroactive effect reaches too far into the past and such effect is arbitrary and capricious and works a great

hardship on the taxpayer and thus takes his property without due process of law. This would be exactly the effect in our case because the Petitioner, being lulled into a sense of security and being required to commit and place himself in a position which he cannot change, the passage of Section 218(a) of the National Industrial Recovery Act, would deprive him of the protection he was promised and would deprive him of his property without due process of law. Also, the cases hold that retroactive effect of taxing statutes will not be put into force so that they will affect transactions which have taken place in a year prior to the year in which this Act was enacted. Therefore, following these cases it definitely appears that if Section 218(a) did affect transactions which took place in 1932, the year prior to its enactment, it would be unconstitutional.

The Respondent in reference to the cases cited by the Petitioner in support of this contention states that such cases do not deal with the precise question of retroactivity here involved. In answer thereto the Petitioner respectfully requests this Court to examine said cases in the Petitioner's Opening Brief where they are set forth in detail. (Op. Br. pp. 18-21.)

Respondent states that there is no support for Petitioner's contention that Section 218(a) is not applicable to the calendar year 1933. In answer thereto the Petitioner respectfully calls this Court's attention to Section D of Argument in his Opening Brief. (Op. Br. pp. 24-26.)

The Petitioner further contends that is is well established that where two constructions of a statute

are possible, one of which is constitutional and the other unconstitutional, the Courts will adopt the former. Many cases could be cited in support of this but the leading cases on the point are:

United States v. Delaware & Hudson Co., 213 U. S. 366, 407;

St. Louis S. W. Ry. v. Arkansas, 235 U. S. 350, 369;

Arkansas Gas Co. v. Railroad Commission, 261 U. S. 379, 383;

United States v. La Franca, 282 U. S. 568, 574.

The Supreme Court of the United States in *Shwab v. Doyle,* 258 U. S. 529, laid down the general rules applicable in such a situation (page 534):

> "The initial admonition is that laws are not to be considered as applying to cases which arose before their passage unless that intention be clearly declared. 1 Kent. 455; Eidman v. Martinez, 184 U. S. 578; White v. United States, 191 U. S. 545; Gould v. Gould, 245 U. S. 151; Story, Const., Sec. 1398. The comment of Story is, 'retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact'."

The Court in *Lewellyn v. Frick,* 268 U. S. 238, involving a tax statute (Revenue Act of 1918), held (page 251):

> "*Acts* of Congress are to be construed if possible in such a way as to avoid grave doubts of this kind. Panama R. R. Co. v. Johnson, 264 U. S. 375, 390. Not only are such doubts avoided by construing the statute as referring only to

transactions taking place after it was passed, but the general principle 'that the laws are not to be considered as applying to cases which arose before their passage' is preserved, when to disregard it would be to impose an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other *ways*. Shwab v. Doyle, 258 U. S. 529, 534." (Italics ours.)

In *United States v. Magnolia Company,* 276 U. S. 160, at page 162, the Court held:

"Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears. United States v. Heth, 3 Cranch. 399, 413, 2 L. ed. 479; White v. United States, 191 U. S. 545, 552, 24 S. Ct. 171, 48 L. ed. 295; Shwab v. Doyle, 258 U. S. 529, 534, 42 S. Ct. 391, 66 L. ed. 747, 26 A. L. R. 1454."

Justice Holmes stated in the case of *Blodgett v. Holden,* 275 U. S. 142, at page 147:

"* * * Upon this, among other considerations, the rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act."

Therefore the Petitioner contends that if the term "subsequent year" may be construed in two different ways the Court should construe it so that it will be possible to make Section 218(a) of the National In-

dustrial Recovery Act constitutional. Therefore in order to accomplish that purpose it must be construed to affect only transactions which take effect in 1933 and losses resulting therefrom may be set up as a deduction in 1934, in that way Section 218(a) would not affect any transactions which took place prior to the year in which the Act was passed, and would thus conform to the constitutional requirements as set forth in the cases cited in both the Petitioner's Briefs and the Respondent's Brief. Petitioner also contends that such a construction would comply with the legislative intent as so expressed. If the other construction was given to the term "subsequent year" so that Section 218(a) was made to affect transactions which took place prior to the year in which the Act was enacted, Section 218(a) would be clearly unconstitutional and of no force and effect. Following this rule further, a proper construction of Section 218(a) of the National Industrial Recovery Act (assuming but not admitting that said section is valid) would be that said section would only affect net losses occurring *after* January 1, 1933, and would not affect losses sustained *prior* to January 1, 1933, and thus the net loss so incurred prior thereto, particularly in 1932, could be used in reduction of the 1933 taxable net income. In this way one of the main reasons why said section is unconstitutional would be overcome.

Petitioner admits here as he did in his Opening Brief (Op. Br. p. 26) that allowance of deductions from gross income is a matter of "legislative grace", but contends that when such "legislative grace" is

once given the taxpayer it is not taken away when the taking away would be arbitrary and capricious or result in gross and patent inequalities which would be the exact effect that the repealing of Section 117 of the Revenue Act of 1932 would have on the Petitioner, if by such repealing he would not be allowed to set up as a deduction in his 1933 Income Tax Return, the net loss he sustained in 1932. This contention of the Petitioner is definitely supported by the case of *Brushaber v. Union Pacific R. R. Co.,* supra, which case was cited by Respondent in support of one of its main points. (Resp. Br. p. 10.)

It is respectfully submitted that Petitioner should be allowed, as a deduction in his 1933 income tax return, the net loss of $63,426.02 sustained in 1932, which is attributable to the operation of his business, from his gross income and that there is no deficiency tax due from the Petitioner for the year 1933 and that the Decision of the Board of Tax Appeals is erroneous and should be reversed.

Dated, San Francisco, California,
July 1, 1940.

Respectfully submitted,
F. David Mannoccir, II,
Attorney for Petitioner.